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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

JENNIFER LAYNE LEWIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Supreme Court of Georgia err in finding that trial counsel's failure to investigate or produce evidence regarding Battered Woman Syndrome in support of a self-defense argument did not violate the Sixth Amendment right to effective assistance of counsel where the Petitioner suffered prior domestic abuse at the hands of the victim, and a number of expert witnesses could have testified that the Petitioner was a battered spouse?

2. Did the Supreme Court of Georgia err in concluding that the Petitioner was not prejudiced by the prosecution's failure to disclose material evidence favorable to the defense in the form of a diagram of the crime scene, where trial counsel, if he had had access to the diagram, could have produced expert testimony based on the diagram that the

physical evidence corroborated the defendant's account of the incident and contradicated the State's theory?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Proceedings Below	2
Statement of Facts	3
ARGUMENT	10
I. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRODUCE EVIDENCE AT TRIAL OF BATTERED WOMAN SYNDROME CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT	10
II. THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE IN THE FORM OF A DIAGRAM OF THE CRIME SCENE PREJUDICED THE DEFENSE AND DEPRIVED THE PETITIONER OF DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT	20
CONCLUSION	29
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Brady v. Maryland, 373 U.S. 83 (1963)	6, 8, 20
Commonwealth v. Stonehouse, 521 Pa. 41, 555 A.2d 772 (1989)	16, 18
Kyles v. Whitley, 115 S. Ct. 1555 (1995)	20, 21, 24, 25 passim
People v. Day, 2 Cal. App. 4th 405, 2 Cal. Rptr. 2d 916 (1992)	17, 18
Strickland v. Washington, 466 U.S. 668 (1984)	10
United States v. Bagley, 473 U.S. 667 (1985)	24, 28

Statutes

28 U.S.C. § 1257	1
U.S. Const. amend VI	2
U.S. Const. amend XIV	2

OPINIONS BELOW

The Petitioner was convicted after a trial by jury on October 18-22, 1993. The conviction was affirmed by the Supreme Court of Georgia in an opinion issued on May 15, 1995, which is set forth in the Appendix at A-1. The Order of the Supreme Court of Georgia denying Petitioner's Motion for Reconsideration was issued on June 8, 1995, and appears in the Appendix at A-18.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Supreme Court of Georgia affirmed the Petitioner's conviction in an Opinion dated May 15, 1995. The final disposition of this case was the Supreme Court of Georgia's decision denying Petitioner's Motion for Reconsideration, issued on June 8, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

Proceedings Below

The Petitioner, Jennifer Layne Lewis, was indicted in the Superior Court of Glynn County, Georgia, and charged with Malice Murder, Felony Murder, Voluntary Manslaughter, and Possession of a Firearm During the Commission of a Crime. The

charges arose from the May 31, 1993 shooting death of Jennifer's husband, Duane Lewis. She was tried by a jury before the Honorable A. Blenn Taylor Jr., on October 18-22, 1993. The jury found her guilty of Felony Murder and Possession of a Firearm During the Commission of a Crime. On October 22, 1993, Lewis was sentenced to life in prison plus five years, to be served consecutively.

Lewis filed a Motion for New Trial which was denied by Order dated September 14, 1994. She then filed an Appeal to the Supreme Court of Georgia, which affirmed her convictions in an opinion dated May 15, 1995. A Motion for Reconsideration was subsequently denied by the Georgia Supreme Court by Order dated June 8, 1995.

Statement of Facts

On May 31, 1993, the Petitioner, Jennifer Layne Lewis, fatally shot her

husband, Duane Lewis, in the bedroom of her home. At all times, Jennifer contended that she shot her husband in self-defense. At trial, Jennifer testified that on the day of the shooting, she had been jet skiing with Duane when he became angry at her for accidentally colliding with his jet ski. Duane held her head under the water so that she could not breathe. He then left the area, saying he was not going home later.

Jennifer returned home and took a shower. When she got out of the shower, she found Duane in the bedroom. He became first verbally, then physically abusive. Jennifer testified that Duane was pushing and shoving her all over the house. When she attempted to call 911 after Duane threatened to kill her, he terminated the call and began choking her. Jennifer was finally cornered by Duane in the bedroom, where he threw her into the closet.

Fearing for her life, Jennifer shot Duane Lewis as she crouched in the closet to save her own life.

Jennifer was represented at trial by Attorney John Ossick, who asserted self-defense. Ossick failed, however, to investigate the possibility that Jennifer suffered from Battered Woman Syndrome (BWS), and he contacted neither any mental health professionals to evaluate Jennifer Lewis, nor expert witnesses to testify for her as to BWS. Furthermore, Ossick failed to request or review the records of Dr. William Shivers, Lewis's primary caregiver at Charter by the Sea Hospital, St. Simon's Island, where she had stayed for three weeks following her release on bond after the shooting. These records reveal numerous specific acts of physical violence and abuse suffered by Jennifer at the hands of Duane Lewis.

Prior to trial, trial counsel made a timely motion for disclosure of evidence favorable to the defense pursuant to this Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). He specifically requested any evidence tending to bear upon the distance between the parties and their relative positions at the time of the shooting. This request was made because defense counsel did not have an opportunity to inspect and measure the crime scene before the body of Duane Lewis was removed.

The trial court conducted an in camera inspection of what the court and the defense believed to be the only death-scene diagram, which did not contain any distance measurements or indicate the exact position of where the body was located after the shooting. The court issued a written Order requiring the State to produce the diagram. Trial counsel

then proceeded to prepare for trial under the impression that no diagram existed detailing the exact position of the body.

Trial counsel contacted an expert who related that without information showing the precise resting point of the body, he could not form an opinion on Jennifer's location at the time of the shooting. Because trial counsel was under the impression that no such information existed, no expert was produced for the defense at trial on this point.

At trial, the State contended that Jennifer was not in the closet when the shot was fired, but was in the bedroom doorway to the hall, which was on the same wall as the closet, and argued that she could have fled the house. The State called Glynn County police officer Ted McDonald, who produced a diagram of the crime scene which he had prepared, containing crucial measurements of the

room and locating the precise recumbent position of the body after the shooting. Neither the court nor defense counsel was aware of the existence of this diagram, which had been withheld despite the court's disclosure order.

Defense counsel immediately moved for a mistrial on the theory that the withholding of the diagram constituted a Brady violation. The court, while admonishing McDonald, denied the motion for mistrial, and gave the defense two hours to prepare for cross-examination and to make use of the diagram. However, defense counsel was neither able to confirm the measurements nor obtain any expert witnesses on such short notice.

Twenty-four-year-old Jennifer Layne Lewis was subsequently convicted of felony murder and sentenced to life imprisonment, and is currently incarcerated at Pulaski

Correctional Institute in Hawkinsville, Georgia.

On appeal, Lewis contended that the trial court erred in failing to grant her motion for mistrial upon the discovery of the diagram of the crime scene, as the withheld evidence was favorable to the defense and material to the issues at trial. She also argued that her trial counsel was ineffective in failing to investigate and produce evidence of BWS to support her theory of self-defense. On each issue, the Georgia Supreme Court affirmed the ruling of the trial court. Lewis's Motion for Reconsideration was subsequently denied.

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRODUCE EVIDENCE AT TRIAL OF BATTERED WOMAN SYNDROME CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

The Sixth Amendment to the United States Constitution guarantees to an accused in a criminal trial the right to effective assistance of counsel. In 1984, this Court decided the landmark case of Strickland v. Washington, 466 U.S. 668 (1984), interpreting the Sixth Amendment right to effective assistance of counsel. Therein, the Court enunciated a two-part test for determining when a criminal defendant's counsel was so defective as to require reversal of a conviction: first, the defendant must show that counsel's performance was deficient via a showing that counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed under the Sixth Amendment;

and, second, the defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Id. at 687. The defendant must show that counsel's representation fell below an objective standard of reasonableness. Id. at 688.

In affirming Lewis's conviction, the Georgia Supreme Court determined that trial counsel's failure to produce evidence of BWS did not fall below an objective standard of reasonableness, and that Lewis did not demonstrate that there was a reasonable probability that the outcome of the trial would have been different but for the alleged error (App. at A-6, A-7). However, in making these determinations, the court failed to give proper weight and consideration to a

number of undisputed facts present in the record.

Initially, the Georgia Supreme Court patently erred when it concluded that trial counsel's failure to investigate or produce evidence of BWS did not fall below an objective standard of reasonableness. Once trial counsel became aware of the background of violence in Lewis's marriage, it became paramount for him to investigate the impact of that violence on Lewis. Yet, trial counsel consulted with none of the mental health professionals or physicians treating Lewis, neither obtained nor reviewed chiropractic records supporting the history of abuse, nor took any steps to affirmatively investigate the possibility of presenting expert testimony on BWS.

Although the court below concluded that trial counsel did not believe, based upon his interviews with Lewis and other

witnesses, that a jury would find the evidence as applied to Lewis credible, he made that determination while totally unfamiliar with the psychiatric testimony available for him to present to the jury as to the battering of Lewis. Trial counsel surely could not have determined the credibility of witnesses he never interviewed.

Nor is there support for the Georgia Supreme Court's conclusion that trial counsel elected not to raise BWS due to his concern that use of such evidence would allow the State to introduce prior bad acts by Lewis not directed against the victim. The additional evidence, which included the fact that Lewis had once hit a relative, that she had punched a hole in the jail wall after her arrest, and that she had smoked marijuana during one of her prior altercations with her husband, was clearly inadmissible as there was no legal

or logical basis for its relevance. Moreover, even if all of these minuscule points had been deemed admissible, they still would not have outweighed the importance of BWS and its effects, which would have allowed her to explain her conduct and establish that she did act in self-defense.

Further, trial counsel determined, without expert assistance, that Lewis was not a battered woman, a determination which he was not competent to make. Indeed, trial counsel exhibited a lack of understanding of BWS. Clearly, any decision trial counsel made with respect to the presentation of evidence on BWS was less than an informed one. Based upon the foregoing, trial counsel's decision not to investigate or use expert testimony on BWS was neither informed nor a reasonable choice of trial strategy, and fell below an objective standard of reasonableness.

Moreover, it cannot be questioned that appellant was seriously prejudiced by counsel's derelictions. No corroboration of her testimony regarding the history of abuse was presented, the jury was not informed of information critical to debunking the myths that still permeate the public understanding of the dilemma faced by battered women, and the prosecutor exploited those myths in cross-examination and during closing argument.

Furthermore, the prejudice resulting to Lewis as a result of her counsel's derelictions was magnified by the fact that the prosecutor directly drew upon and exploited those misconceptions which expert evidence would have corrected, including a repeated emphasis on Lewis's failure to leave the dwelling or to seek police intervention or other assistance before the fatal incident. These misconceptions went completely unrebutted

by available expert witnesses due to counsel's failure to investigate BWS. Thus, the Supreme Court of Georgia clearly erred when it concluded that there was not a reasonable probability that the outcome of the trial would have been different but for counsel's errors.

The present case constituted a case of first impression in Georgia on the issue of whether the failure to investigate and produce evidence of BWS constitutes ineffective assistance of counsel in violation of the Sixth Amendment. However, several state courts which have addressed the issue presented here have reached conclusions which conflict with the decision below.

For example, in Commonwealth v. Stonehouse, 521 Pa. 41, 555 A.2d 772 (1989), the Pennsylvania Supreme Court found trial counsel ineffective for failing to present expert testimony

detailing the impact battering has on a woman. The court noted that such evidence would have helped to explain both the battered woman's reluctance to seek help from others and why she had a reasonable belief that she faced a life-threatening situation. The court concluded that there was no reasonable basis for counsel not to call an expert witness to counter the erroneous myths upon which the prosecution built its case. 555 A.2d at 784-85.

Likewise, in People v. Day, 2 Cal. App. 4th 405, 2 Cal. Rptr. 2d 916 (1992), the California Court of Appeal reversed a defendant's manslaughter conviction on grounds of ineffective assistance of counsel for failing to present evidence of BWS. The court concluded that failure to present BWS evidence was prejudicial in that the evidence was critical in permitting the jury to evaluate the accused's testimony, free of the

misconceptions regarding battered women, and would have allowed her to counter the battered woman myths upon which the prosecutor had built his case. 2 Cal. Rptr. 2d at 920-21. Just as in the present case, the court noted that the accused provided the only eyewitness account and that the prosecution's case rested upon circumstantial evidence and exploitation of myths about battered women. Id.

The parallels among Stonehouse, Day, and the instant case are several, but in one respect, the present case involved an even greater dereliction by trial counsel. Not only did Lewis suffer from the absence of expert testimony, but her credibility was left subject to attack by the prosecutor due to the absence of corroborative evidence that would have confirmed the prior acts of abuse. The availability of this evidence, including

testimony from Lewis's chiropractor and supporting medical documentation, was known to trial counsel but never proferred at trial. Again, the prosecutor took full advantage of the failure to produce existing evidence by emphasizing it throughout his closing argument. Thus, not only was Lewis hampered in presenting her defense, she was also rendered less than credible by the lack of substantiation of her own testimony. Judged by any standard, trial counsel's failure to present BWS evidence clearly constituted ineffective assistance of counsel and prejudiced Lewis at trial.

Because the Georgia Supreme Court has decided the federal question of whether the failure to investigate and produce BWS violates the Sixth Amendment in a way that conflicts with the decisions of other state courts of last resort, the granting of a writ of certiorari is appropriate

here to resolve that conflict and to provide other state courts with guidance on this important issue of federal constitutional law.

II. THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE IN THE FORM OF A DIAGRAM OF THE CRIME SCENE PREJUDICED THE DEFENSE AND DEPRIVED THE PETITIONER OF DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Over 30 years ago, this Court recognized that a criminal defendant's right to due process is violated when the prosecution withholds evidence favorable to the accused where the evidence is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). This decision has been refined and expounded upon by the Court over the years, most recently in Kyles v. Whitley, 115 S. Ct. 1555 (1995), which was rendered after oral argument of the case at bar. Because the decision of the Supreme Court

of Georgia in the instant case is in direct conflict with this Court's opinion in Kyles, the granting of a writ of certiorari is appropriate to resolve that conflict.

In affirming Lewis's conviction, the Supreme Court of Georgia found that Lewis was not prejudiced by the State's failure to produce the diagram before trial (App. at A-4, A-5). Again, in making this determination the court failed to give proper weight and consideration to a number of undisputed facts.

The court's determination that Lewis was not prejudiced by the suppression of the diagram was based on two patently erroneous conclusions. First, the court concluded that Lewis and her counsel could have made their own diagram of the scene and taken their own measurements. However, the critical measurements in question concerned placement of the

deceased's body following the shooting. Once the body was removed, there was no possible way for Lewis to have ascertained or reconstructed the precise recumbent position of the body other than by the withheld diagram.

Second, the court determined that Lewis was not prejudiced because defense counsel was given two hours to contact possible experts and was told he could have a continuance until that Friday for possible expert testimony. However, at that time, prejudice had not yet occurred because only later did the prosecution present testimony that, based upon the measurements contained in the suppressed diagram, the shot originated from the doorway and not the closet. At this time, trial counsel's objection was overruled and his motion for a continuance was denied. Moreover, Lewis could not have reasonably been expected to obtain a

qualified expert to testify on her behalf in two hours.

Furthermore, Lewis was able to present testimony from a renowned expert in forensics at her Motion for New Trial hearing that it would not have been possible to determine, without the measurements to locate the precise recumbent position of the body, that the shot originated from the closet and not from the hallway. However, with the aid of the suppressed diagram, he could have testified with confidence that the prosecution's theory was absurd and that the physical evidence was consistent with Lewis's testimony. Clearly, this type of testimony would have made a substantial difference in Lewis's defense. Thus, it is apparent that the presentation of the withheld evidence, coupled with the erroneous testimony of the prosecution's expert, based upon the diagram, denied

Lewis a fair trial in violation of th Fourteenth Amendment.

Additionally, the ruling below i contrary to the holding of this Court i Kyles v. Whitley, supra. The Kyles rulin reaffirmed the ruling of this Court i United States v. Bagley, 473 U.S. 66 (1985), which held that favorable evidenc is material if there is a reasonabl probability that, had the evidence bee disclosed to the defense, the result o the proceeding would have been different Kyles v. Whitley, supra, 15 S. Ct. a 1566. The Court explained that a showin of materiality does not require demonstration that disclosure of th suppressed evidence would have ultimatel resulted in an acquittal; rather, reasonable probability of a differen result is shown when the government' evidentiary suppression undermine

confidence in the outcome of the trial. Id.

The Court also noted that evidence that the government fails to disclose is considered collectively with all the evidence to determine its materiality. Id. at 1567. Finally, this Court reiterated that the prosecutor is responsible for learning of any favorable evidence known to others acting on the government's behalf, including the police. Id.

In the instant case, it is clear that the prosecution was under a constitutional duty to disclose the measurements in the diagram and that Lewis was prejudiced by its suppression. Kyles mandates this conclusion, as the suppression of the evidence in question here clearly undermines confidence in the outcome of the trial.

Here, there is no question that Lewis shot the victim; rather, she contended that she shot in self-defense while crouched in a closet where she was cornered after a beating by the victim. The State presented no eyewitness testimony, but only physical evidence and the State's interpretation of that evidence, which was presented to the jury as confirmed physical evidence, based upon the withheld diagram, that Lewis was not in the closet, but in the hallway when she fired. Had trial counsel had access to the diagram, he could have produced expert testimony that the conclusions of the police were incorrect and that the physical evidence was consistent with Lewis's testimony that she shot from the closet.

The parallels between the situation in Kyles and the present one mandate the conclusion that Lewis was not accorded a

fair trial based upon the suppression of the diagram. As in Kyles, disclosure of the suppressed evidence in this case would have resulted in a markedly weaker case for the prosecution and a stronger case for the defense. Timely disclosure of the diagram would have allowed Lewis to attack the prosecution's theory and bolster her own credibility, as well as to allow impeachment of the testimony of the detectives whose own testimony was used by the prosecution to impeach Lewis's credibility. Without the hidden diagram, however, Lewis had no means of contradicting the prosecution's theory that the shot was not fired from the closet.

Since this possible testimony was precluded by the prosecution's failure to disclose the evidence to support it, "fairness" cannot be stretched to the point of saying Lewis received a fair

trial. The suppressed evidence would have allowed the jury to find that Lewis was forced to shoot from the closet in self-defense, and that the State's most damning evidence was based upon an incorrect conclusion. As a result, the verdict in this case was unreliable and the suppression of the diagram violated Lewis's right to due process.

Because the decision of the Georgia Supreme Court in this case is in conflict with the decisions of this Court in Kyles v. Whitley, supra, and United States v. Bagley, supra, this Court should agree to hear this case to provide guidance to other state courts on this important issue.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Jennifer Layne Lewis, requests this Court to grant her Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

	Page
SUPREME COURT OF GEORGIA OPINION AFFIRMING JUDGMENT OF CONVICTION, DATED MAY 15, 1995	A-1
ORDER OF GLYNN COUNTY SUPERIOR COURT DENYING MOTION FOR NEW TRIAL DATED SEPTEMBER 14, 1995	A-8
SUPREME COURT OF GEORGIA ORDER DENYING MOTION FOR RECONSIDERATION, DATED JUNE 8, 1995	A-18

In the Supreme Court of Georgia

Decided: May 15, 1995

S95A0250. LEWIS v. THE STATE

HUNT, Chief Justice.

Jennifer Layne Lewis shot and killed her husband, Duane Lewis, with a handgun. She was convicted of felony murder and possession of a firearm during the commission of a crime and sentenced to life in prison plus five years to be served consecutively.[1] She appeals and we affirm.

---

[1]The crimes were committed on May 31, 1993. Lewis was indicted by the Glynn County Grand Jury in its March 1993 term for malice murder, felony murder, voluntary manslaughter and possession of a firearm during the commission of a crime. She was tried before a jury October 18-22, 1993, and sentenced on October 22, 1993. Her motion for new trial, filed November 10, 1993 and amended September 6, 1994 was denied on September 14, 1994. Lewis filed her notice of appeal on September 22, 1994, the appeal was docketed in this court on November 2, 1994 and orally argued on March 13, 1995.

1. We have reviewed the evidence in the light most favorable to the jury's determination and conclude that a rational trier of fact could have found the defendant guilty of the crimes for which she was convicted beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Lewis contends the trial court erred in denying her motion for new trial, contending error in the trial court's failure to grant a mistrial. We disagree.

Lewis argues the trial court was required to grant her motion for a mistrial made when it became apparent, on direct examination of a police detective testifying for the state, that although the state, pursuant to a Brady motion, had turned over to the defense a diagram of the crime scene, the state had not turned over to the defense (and apparently the prosecutor was unaware of this evidence

prior to the detective's testimony) a copy of the diagram with measurements the detective had taken at the scene. In denying the motion for new trial on this ground, the trial court noted that it had given the defense several hours to review the diagram and interview witnesses regarding the diagram and measurements, and had also offered to recess the trial for several days so that the defense could obtain expert evidence in rebuttal, which offer defense counsel declined. The trial court also noted that two witnesses testifying for the defense at the hearing on the motion for new trial regarding the necessity of the evidence to the defense and various flaws in the detective's measurements of the crime scene, said they could have prepared within a relatively short period of time to testify in rebuttal regarding the evidence had they been asked to do so at trial. Further, the

trial court noted the crime scene, Lewis's residence, was under her control prior to trial, that she was able to take measurements of the scene, and that she should have anticipated the measurements which would have been at issue at trial.

The record supports the trial court's findings and conclusions that Lewis has not demonstrated prejudice in the state's failure to produce the diagram before trial. Dennard v. State, 263 Ga. 453, 454(4) (435 SE2d 26) (1993).

3. Lewis contends the trial court erred by denying her motion for new trial on her claim of ineffective assistance of trial counsel. We disagree.

Lewis argues trial counsel's performance was defective because he failed to present evidence of the battered woman syndrome in support of Lewis's claim of self-defense. Trial counsel testified that he was familiar with this syndrome

and that he had used evidence of the syndrome as part of the defense in at least one case. He further testified that he rejected the use of such evidence in this case for two reasons. First, based on his interviews with Lewis and other witnesses, he did not believe a jury would find the evidence as applied to Lewis credible. Second, he was concerned that use of that evidence would permit the state to present evidence of prior violent acts by Lewis not directed against the victim, whereas foregoing evidence of the syndrome as part of the defense of justification would limit the state to prior acts of aggression by Lewis against the victim. The trial court held that trial counsel's decision not to pursue a defense based on the battered woman syndrome was a reasonable choice of trial strategy.

We agree with the trial court that Lewis has not shown that trial counsel's failure to produce evidence regarding the battered woman syndrome fell below an objective standard of reasonableness. Ferrell v. State, 261 Ga. 115, 119(3) (401 SE2d 741) (1991). Although the trial court made no findings or conclusions in this regard, we note that Lewis also did not demonstrate that there was a reasonable probability that the outcome of the trial would have been different but for the alleged error. Kidwell v. State, 244 Ga. 427, 432(11) (444 SE2d 789) (1994). Accordingly, Lewis has met neither prong of the test for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (104 SC 2052, 80 LE2d 674) (1984), and the trial court did not err in denying her motion for new trial on this ground.

Judgment affirmed. All the Justices concur.

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

VS. INDICTMENT NO. 93-00362

JENNIFER LAYNE LEWIS,

DEFENDANT

O R D E R

Defendant's motion for new trial came before the Court on September 12 and September 13, 1994. Evidence was presented on two of the grounds raised in said motion, as amended. Defendant contends her trial counsel was ineffective because they failed to raise the battered woman syndrome as an element of her defense of justification. She also asserts she was denied a fair trial by reason of the State's non-compliance with the Court's direction to make all photographs

and other materials depicting the crime scene available to the defense prior to trial. A diagram of the scene which included measurements was not provided until it was referred to during the trial.

Defendant presented expert testimony she was suffering from the battered woman syndrome, see Smith v. State, 247 Ga. 612 (1981). She contends her trial attorney's failure to procure and introduce such evidence constituted ineffective assistance of counsel.

> [T]he burden is on the defendant claiming ineffectiveness of counsel to establish (1) his attorney's representation in specified instances fell below "an objective standard of reasonableness" and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 695-96 (104 S. Ct. 2052, 80 L. Ed. 2d 674) (1984).

Williams v. State, 258 Ga. 281, 286 (1988). There is a strong presumption trial counsel's performance falls within the wide range of reasonable professional assistance, and any challenged action by them must be evaluated as potentially sound trial strategy. Ferrell v. State, 261 Ga. 115, 119 (1991), citing Strickland v. Washington, supra. The State contends the decision by Defendant's trial counsel to forego a battered woman defense was a legitimate trial strategy, because if she had asserted it, the State would have been authorized to present evidence of prior violent acts on her part directed against third persons, and evidence she damaged a wall at a jail after an arrest

on a drug charge. By electing not to pursue that defense, the only prior violent conduct by Defendant the State could present was that directed at the victim. Defendant asserts trial counsel's decision provided no real benefit to her, since no such opening of the door to evidence of prior bad acts would have resulted if evidence she was a battered woman had been offered.

Defendant correctly notes that the battered woman syndrome is not a separate defense, but rather is part of the defense of justification. Chapman v. State, 259 Ga. 706 (1989). But this fact does not necessarily demand a conclusion the scope of evidence subject to introduction is not altered when a claim the syndrome exists is made. Smith v. State, supra, held expert evidence can be received on the nature and effect of the battered woman syndrome because jurors will ordinarily be

unable to draw conclusions on those matters for themselves. Generally, the battered woman syndrome is offered as a basis for explaining why a woman might properly claim justification as a defense to a killing even though it occurred at a time when the immediate threat to her safety, viewed in isolation, would not support a finding of justification. See Pugh v. State, 260 Ga. 874 (1991). But the jury, not the expert, retains its role as the ultimate finder of fact. A party challenging the conclusion of an expert witness is authorized to present alternate factual circumstances to the witness, assuming there is a good faith basis for the posited facts, and to inquire whether the expert would alter their opinion if those facts were found to be true. Krause v. Vance, 207 Ga. App. 615, 617 (1993). Therefore, an expert witness who attributes a killing to the effects of the

battered woman syndrome can be asked whether commission of specific violent acts unrelated to a male-female relationship would cause them to modify that opinion.

The Court finds the decision by Defendant's trial counsel not to pursue a defense based upon the battered woman syndrome because that would permit the State to introduce negative facts about Defendant's conduct and propensity for violence to be a reasonable choice of trial strategy. Unlike the situations presented in Chapman v. State, supra and Pugh v. State, supra, where the victim was not threatening the accused (sleeping and bathing, respectively), Defendant's trial testimony was that the victim, her spouse, was assaulting her when she shot him. As noted above, the battered woman syndrome is not a separate defense, and it is generally used to bridge the gap between

a killing and the absence of a contemporaneous threat to personal safety to support a claim of justification. That gap was not present in this case, and trial counsel's decision the negative effect introduction of evidence of prior violent conduct by Defendant outweighed the benefit of asserting a ground for justification over and above what her testimony presented was not per se unreasonable. The Court thus concludes as a matter of law and fact that Defendant's representation at trial was not ineffective.

Defendant also contended she was prejudiced by the failure of the State to make a diagram of the crime scene prepared by the investigating officer available prior to trial. The Court had directed pretrial production of photographs and other evidence showing the crime scene. The State contends the production of the

diagram during the trial, coupled with the Court's offer to recess the trial to provide the defense with an opportunity to evaluate it, rendered the failure to produce it before trial harmless.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) does not require pre-trial disclosure of exculpatory material, and is not violated when such material is made available to defendants during the trial. Castell v. State, 250 Ga. 776, 781 (1983). However, in some circumstances the failure of the state to provide the defense with potentially exculpatory evidence sufficiently in advance of trial to permit it to be adequately developed could constitute a denial of the fair trial guaranteed by the federal and State Constitutions. In this case, the location of the shooting, Defendant's residence, was under her exclusive control, and she

was free on bond prior to her conviction. The photographs of the crime scene provided to the defense prior to trial and the bloodstains on the carpet were sufficient to enable the defense to ascertain the location of the victim's body in the room where he was shot. The diagram in question, Court's Exhibit No. 2, which did not go out with the jury, may have understated the size of a closet. But the size of the closet was an issue the defense could anticipate prior to trial, since Defendant planned to testify she had been pushed into it by the victim just prior to the shooting. The Court indicated it would recess the trial if that were necessary to enable the defense to respond to the diagram, but no recess was requested by Defendant's counsel. Based on the foregoing, the Court concludes that Defendant was not prejudiced by reason of

the State's failure to make the diagram available prior to trial.

The Court has considered the remaining grounds asserted in Defendant's motion for new trial, as amended, and finds them to be without merit. Therefore, said motion is hereby DENIED.

This 14 day of September 1994.

A. Blenn Taylor, Jr.
Chief Judge, Superior Courts
Brunswick Judicial Circuit

SUPREME COURT OF GEORGIA

Case No. S95A0250 Atlanta, June 8, 1995

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

JENNIFER LAYNE LEWIS V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.